IN THE SUPREME COURT OF THE STATE OF IDAHO
DOCKET NO. 29299

THE CITY OF COEUR D'ALENE, an Idaho Municipal Corporation,	)	
Plaintiff-Counterdefendant-Respondent,	)	**Coeur d'Alene, October 2004 Term**
v.	)	**2005 Opinion No. 18**
JACK W. SIMPSON and VIRGINIA S. SIMPSON; and BEACH BROTHERS, INC., an Idaho corporation,	)	**Filed: February 8, 2005**
Defendants-Counterplaintiffs-Appellants.	)	**Stephen W. Kenyon, Clerk**

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. Charles W. Hosack, District Judge.

The judgment of the district court is affirmed and remanded for proceedings consistent with this opinion.

John F. Magnuson, Coeur d'Alene; Runft Law Offices, PLLC, Boise, for appellants. John L. Runft argued.

Quane, Smith, Coeur d'Alene, for respondent. Michael L. Haman argued.

KIDWELL, Justice Pro Tem

The Simpsons and Beach Brothers, Inc. appeal the district court's decision, which granted injunctive relief by summary judgment regarding the waterward parcel of their property and dismissed their amended counterclaims relating to the waterward parcel. The counterclaims included deprivation of substantive and procedural due process, violations of equal protection and inverse condemnation. The Simpsons and Beach Brothers, Inc. also appeal the denial of their motion for disqualification of the district judge. This Court affirms the decisions of the district court.

I.

FACTUAL AND PROCEDURAL BACKGROUND

In 1907, the Lakeshore Addition subdivision on Lake Coeur d'Alene, Idaho, was recorded and admitted into the City of Coeur d'Alene (the City). In 1928, the City enacted Ordinance No. 676, seeking to preserve the Lakeshore Addition area by proscribing the establishment or maintenance of buildings, structures, wood, rocks and rubbish on the portion of that Addition commonly referred to as Sanders Beach. In 1965, the City adopted Ordinance No. 1197, amending Ordinance No. 676. Ordinance No. 1197 prohibits landowners from building structures in the area of Lakeshore Addition commonly known as Sanders Beach. In 1982, Ordinance No. 1722 was enacted and had the effect of reinforcing the proscriptions set forth in Ordinance No. 676. Ordinance No. 1722 applied to all of the Shoreline within the City limits. Ordinance No. 1722 stated that all construction within forty feet of the shoreline, defined at elevation 2128 WWP datum, shall be prohibited except as provided therein. Ordinances 676, 1197 and 1722 (the Shoreline Ordinances) sought to preserve the Lake Coeur d'Alene beachfront.

In April 1994, Jack and Virginia Simpson purchased property from Donald Wagstaff by warranty deed. The property is located in Coeur d'Alene, with a general street address of 1321 E. Lakeshore Drive. It consists of Lots 11, 12, 13 and 14 of Block 29 of Lakeshore Addition (upland parcel) and parcels 1506, 1507 and 1508 (waterward parcel). The waterward parcel includes approximately 230 feet of frontage along Lake Coeur d'Alene and is separated from the upland parcel by Lakeshore Drive and lies directly south of the upland parcel. Kootenai County assessed the value of the upland and waterward parcels as one unit from 1995 through 1998, in addition to treating both parcels of the Simpsons' property as one unit for purposes of assessing taxes in 1999.

The Simpsons installed a wrought iron fence around the upland parcel. In December 1997, after experiencing some problems with people entering their waterward parcel, the Simpsons installed two sections of chain link fence on the waterward parcel at or near the western and eastern boundaries so as to preclude public access to the waterward parcel. The City issued a "Stop Work" notice and informed the Simpsons that the erection of non-conforming structures on the waterward parcel violated city ordinances prohibiting construction of fences within forty feet of the shoreline. The City

followed up with a letter outlining the ordinances violated by the waterward fence. The Simpsons' non-removal of the fences prompted the City of Coeur d'Alene to file a Complaint for Injunctive Relief against the Simpsons. The City sought an order of permanent injunction for the removal of the fences on both the waterward and upland parcels of land.

On September 25, 1998, the Simpsons filed their Answer and Counterclaim, asserting various affirmative defenses and counterclaims. The Simpsons claimed the Shoreline Ordinances were unconstitutional in that they deprived the property of all economically viable use with no concomitant payment of just compensation, and because the ordinances had been applied unequally. The Simpsons also asserted counterclaims under 42 U.S.C. § 1983 for inverse condemnation, seeking recovery for alleged violations of their due process and equal protection rights under the Fifth and Fourteenth Amendments to the United States Constitution. The Simpsons later filed a First Amended Answer and Counterclaim, which included a jury demand.

On December 23, 1999, the Simpsons filed a Motion for Disqualification for Cause of the district judge assigned to the case. The Simpsons' Motion For Disqualification was based on, among other things, the fact that the district judge represented the City prior to becoming a district court judge. The Motion was denied by the district court on January 24, 2000.

Also in December 1999, the City filed its initial Motion for Summary Judgment seeking entry of a permanent injunction for the removal of the nonconforming fences and a dismissal of the Simpsons' counterclaims. On August 17, 2000, the district court entered a Memorandum Decision on the City's initial Motion For Summary Judgment. Regarding the fence on the upland parcel, the district court held that the City was not entitled to injunctive relief on summary judgment and also denied the City's Motion for Summary Judgment on the equal protection claim related to the upland parcel. The district court granted summary judgment in favor of the City regarding the waterward parcel, finding the ordinances prohibiting the fence within the forty-foot setback zone on the waterward parcel do not constitute a taking. The district court also dismissed the Simpsons' equal protection claim regarding the waterward parcel.

In March 2001, Jack Simpson, acting as incorporator, formed Beach Brothers, Inc. (Beach Brothers), an Idaho Corporation, naming the Simpsons' adult sons as the only shareholders of Beach Brothers. On March 26, 2001, Jack and Virginia Simpson conveyed the waterward parcel to Beach Brothers. The transfer of the waterward parcel to Beach Brothers was for estate planning purposes and to protect Jack and Virginia Simpson from unwanted potential personal liabilities associated with personal ownership of the waterward parcel. Jack and Virginia Simpson personally paid taxes on the waterward parcel after they conveyed it to Beach Brothers.

The City made a second Motion for Summary Judgment. However, at the hearing the City moved to amend its complaint to include Beach Brothers as a defendant, so the district court declined to consider the second Motion for Summary Judgment until the Amended Complaint had been filed and Beach Brothers was added as a party. In June of 2002, the City renewed its Motion for Summary Judgment for a third time. Prior to ruling on the third Motion for Summary Judgment, the district court vacated the jury demand made by the Simpsons.

On October 24, 2002, the district court entered its Memorandum Decision on the City's third Motion For Summary Judgment. The court found that there were questions of fact precluding a grant of injunctive relief by summary judgment as to the upland parcel. The court also denied the Motion for Summary Judgment as to the equal protection and due process claims regarding the upland parcel. The court found that the City was entitled to injunctive relief by summary judgment as to the fences on the waterward parcel that were within the forty-foot setback zone. Additionally, the court dismissed the counterclaims related to the waterward parcel. Two months later, the district court entered its Judgment and Order of Permanent Injunction, ordering the removal of the fences from the waterward parcel within thirty days.

The Simpsons and Beach Brothers (collectively the Simpsons) timely appeal to this Court. The only issues on appeal to this Court relate to the waterward parcel. Issues relating to the upland parcel are still pending in district court. This Court granted the Simpsons' Motion for Stay of Order and Permanent Injunction during the pendency of this appeal.

II.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment by using the same standard properly employed by the district court originally ruling on the motion. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). This Court construes the record in the light most favorable to the non-moving party, drawing all reasonable inferences in favor of that party. *Samuel*, 134 Idaho at 87, 996 P.2d at 306. If the evidence reveals no genuine issue as to any material fact, then all that remains is a question of law over which this Court exercises free review. *McCuskey v. Canyon County Comm'rs*, 128 Idaho 213, 215, 912 P.2d 100, 102 (1996).

III.

ANALYSIS

A. The District Court Did Not Err In Dismissing The Simpsons' Counterclaim For Inverse Condemnation.

An action for inverse condemnation is an eminent domain proceeding initiated by the property owner rather than the condemnor. *Covington v. Jefferson County*, 137 Idaho 777, 780, 53 P.3d 828, 831 (2002). "The Fifth Amendment forbids the taking of private property for public use without just compensation." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 336 (2002). However, unless an actual taking of private property is established, an inverse condemnation action cannot be maintained. *Covington*, 137 Idaho at 780, 53 P.3d at 831. "Because the determination of whether there has been a taking is a question of law, this Court exercises free review over the decision of the trial court." *Id.*

Takings jurisprudence recognizes two types of takings: physical and regulatory. *Tahoe-Sierra Preservation Council*, 535 U.S. at 321-22. A physical taking occurs when the government physically occupies land for its own use, regardless of whether the interest taken constitutes the entire parcel or merely a part thereof. *Id*. at 322. This type

of taking is often referred to as a "categorical taking" and requires the government to compensate the landowner. *Id*. at 322-23. Jurisprudence concerning condemnations and physical takings involves the straightforward application of *per se* rules. *Id.* at 322.

A regulatory taking, commonly referred to as a "non-categorical taking," does not apply the clear *per se* rules of a categorical taking. *Id*. at 323-24. Regulatory takings jurisprudence is characterized by "essentially ad hoc, factual inquiries" designed to allow "careful examination and weighing of all the relevant circumstances." *Id*. at 322 (internal citations omitted). This ad hoc, factual inquiry, commonly referred to as the "*Penn Central*" test, balances the public and private interests at stake by weighing a complex set of factors, three of which have particular significance: (1) the regulation's economic effect on the landowner, (2) the extent to which the regulation interferes with the reasonable investment-backed expectations, and (3) the character of the government action. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124-25 (1978) (quotations and citations omitted).

However, there are two discrete categories of regulatory action that are compensable without the ad hoc, factual inquiry into the public interest advanced in support of the regulation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). The first involves regulations that compel the property owner to suffer a physical invasion of his property. *Id*. Under these circumstances, "the 'character of the governmental action' . . . itself becomes sufficient to effect a taking." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). The second category in which categorical treatment is proper is where the regulation denies *all* economically beneficial or productive use of land. *Lucas*, 505 U.S. at 1015 (emphasis added). Under these circumstances, no ad hoc balancing is required; rather, the regulation constitutes a categorical taking when it deprives the claimant of "all economically beneficial and productive use of [his or her] land." *Id*. In the instant case, the Simpsons argue that the Shoreline Ordinances effect a "categorical taking" under the two rules provided in *Lucas* on their face and as applied. Alternatively, the Simpsons argue the ordinances have effected a "non-categorical" taking.

Ordinance No. 1722, the most recently enacted Shoreline Ordinance, states that "A variance may be granted from any provision of the Shoreline Regulations . . .

provided that the variance conforms to the stated purpose of the Shoreline Regulations." COEUR D'ALENE, IDAHO ORDINANCE No. 1722, § 17.08.255 (1982). At oral argument the question was raised whether this language requires parties to apply for a variance prior to asserting takings claims against the City. The ordinance states that a variance "may" be granted, it does not contain language requiring a variance to be sought. Neither party raised or briefed the issue of whether the Simpsons needed to seek a variance. When asked whether it would it be futile for the Simpsons to have sought a variance, the attorney for the City answered, "Perhaps." We hold that under the facts herein, the Simpsons are not required to have applied for a variance prior to asserting their inverse condemnation claim.

Aggregation Of The Parcels

Before addressing whether a taking has occurred, this Court must determine what is the economically relevant property interest at stake, i.e., one or two pieces of property. The Simpsons claim the district court erred in aggregating both parcels. Because the test for regulatory taking requires a comparison of the value that has been taken from the property with the value that remains in the property, one of the critical questions is how to define the unit of property, the value of which will furnish the denominator of the fraction. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987). This analysis is usually referred to as the "denominator" or "conceptual severance" problem. *See Tahoe-Sierra Preservation Council*, 535 U.S. at 331. "Conceptual severance" deals with the disaggregation of a whole parcel into smaller parts for purposes of takings analysis. *Id.* However, the United States Supreme Court has consistently rejected the conceptual severance approach to the "denominator" analysis. *Id.* As such, the question is whether the property being analyzed for takings purposes consists of both parcels or only the waterward parcel. Because the "denominator" problem is part of the takings analysis, it is a question of law for this Court based on the facts of the case. *See Covington*, 137 Idaho at 780, 53 P.3d at 831.

When the Simpsons bought the property, they bought both the upland and waterward parcels together by warranty deed in one conveyance from Donald Wagstaff. The record also indicates that Donald Wagstaff, the Simpsons' predecessor in interest,

purchased both parcels as a whole. This Court is not holding that two or more parcels should be treated as one unit every time they are transferred together. There are several other factors that lead this Court to agree with the district court's conclusion that the waterward and upland parcels should be treated as one unit. The district court stated:

> Simpsons have now conveyed the waterward parcel to Beach Brothers, Inc. Simpsons aver that the earlier judicial reluctance [during the court's ruling on the first Motion for Summary Judgment] to accept conceptual severance is now further supported by the fact that the parcels now are in separate legal ownership.
>
> It is the observation of this Court that the transfer of record title by Simpsons to Beach Brothers, Inc. actually has the opposite effect of what may have been intended. The Simpson affidavit states unequivocally that the transfer to Beach Brothers, Inc. was to benefit the Simpsons as the owners of the upland parcel. The transfer was designed to protect the Simpsons, who retained record title ownership of the upland parcel, from liability claims which might arise out of ownership of the waterward parcel. Furthermore, the transfer of the waterward parcel was to family members, for purposes of estate planning, presumably to benefit the family, including the Simpsons as owners of the upland parcel. There is nothing in the record to indicate that the transfer of record title ownership has in any way changed the Simpsons' continued use of the beachfront parcel.
>
> In short, Simpsons have unequivocally established on the record that, even though the parcels are now held in different record title ownership, the real property is in fact owned and operated as a conceptual and practical unit.
>
> The Court would note that, even without the transfer to Beach Brothers, Inc., the record supports the finding that the upland parcel and the waterward parcel have historically been one unit. Simpsons' own affidavit details the historic nature of the residence in which he lives. The ordinance which he attacks was passed in 1928. The Shoreline Ordinance predates Simpsons' ownership. The only change in use of the real property which the record reflects is the Simpsons' recent erection of the cyclone fences in issue under the Shoreline Ordinance. The record reflects Simpsons and Beach Brothers, Inc. make use of both parcels as an integrated unit.
>
> The record supports the determination that, from the time the 1928 Ordinance was passed to and including the time of the Beach Brothers, Inc. ownership, the real property in question has been treated as one unit.
>
> The Court therefore concludes that the denominator unit is the real property consisting of both the upland and waterward parcel.

Further, for the years 1995 through 1998, Kootenai County assessed the value of the property, both the upland and waterward parcels, as a whole. For purposes of

assessing taxes in 1999, Kootenai County also treated the parcels as a whole. For these reasons and those set forth by the district court, this Court finds the denominator unit consists of both the upland and waterward parcels. Based on the above discussion, there is no need to engage in "conceptual severance" to determine the proper denominator because it consists of both the upland and waterward parcels.

Categorical Taking

Having defined the relevant property as a combination of the waterward and upland parcels, a number of the Simpsons' arguments may be disposed of. It is clear that the application of the Shoreline Ordinances to Simpsons' property does not constitute a categorical taking under the rules provided by *Lucas* because the Shoreline Ordinances do not compel the Simpsons to suffer a physical invasion of their property by the government, and because together, the parcels retain significant value, as illustrated by the affidavit of Jack Simpson. Therefore, based on the above takings rules, the Simpsons' categorical taking argument fails as a matter of law.

Non-Categorical Taking

The Simpsons alternatively argue that the Shoreline Ordinances "as applied" constitute a non-categorical taking. This argument fails because the Simpsons have not pleaded facts sufficient to show a taking under the *Penn Central* factors as discussed above. The Simpsons do not claim that the Shoreline Ordinances have denied them the economically beneficial use of the entire lot consisting of both the upland and waterward parcels. Instead, they contend that the ordinances have effected a diminution in the value of just the waterward parcel. Diminution in property value standing alone does not establish a taking. *Penn Central Transp. Co.*, 438 U.S. at 131. Additionally, the Simpsons have not presented evidence of any investment-backed expectations regarding the property as a whole. Finally, the Simpsons have not shown how the Shoreline Ordinances fail to advance a legitimate public purpose as required under the *Penn Central* analysis for a non-categorical taking.

The Simpsons assign error to the district court's denial of their jury demand. This argument also fails because all issues regarding inverse condemnation are to be resolved

by the trial court, except the issue of just compensation. *Covington*, 137 Idaho at 780, 53 P.3d at 831. In this case, the trial court did not find a taking, so there was no need to determine just compensation.

The Simpsons argue that the district court erred in finding their takings claims are time-barred. The district court relied on *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001), for the proposition that the time to file a facial challenge expired four years from the enactment of Shoreline Ordinance 676, which was enacted in 1928. However, the *Palazzolo* Court rejected this proposition as illogical and held that a challenge to the application of a land-use regulation does not mature until ripeness requirements have been satisfied. *Palazzolo*, 533 U.S. at 627-28. The district court's conclusion that the Simpsons' inverse condemnation claims are time-barred, based on its reading of *Palazzolo*, was incorrect. However, an error that does not affect the substantial rights of a party shall be disregarded as harmless error. I.R.C.P. 52. In this case, based on the above inverse condemnation analysis, the district court's error was harmless because even if the takings claims are not time-barred, the Simpsons do not have a valid takings claim to pursue and, therefore, their substantial rights have not been affected.

In conclusion, the district court's grant of summary judgment in favor of the City was not in error because the Simpsons failed to establish facts sufficient to sustain an inverse condemnation claim.

B. The District Court Did Not Err In Dismissing The Simpsons' Counterclaim For Deprivation Of Substantive and Procedural Due Process.

Substantive due process embraces the right of citizens to be free "from arbitrary deprivations of life, liberty, or property." *State v. Reed*, 107 Idaho 162, 167, 686 P.2d 842, 847 (Ct. App. 1987). Ordinances that serve a reasonably conceivable, legitimate legislative objective do not violate the rights protected under the concept of substantive due process. *Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 69, 28 P.3d 1006, 1012 (2001). Because substantive due process is a constitutional issue, this Court exercises free review. *Brewer v. La Crosse Health & Rehab*, 138 Idaho 859, 862, 71 P.3d 458, 461 (2003).

The Simpsons do not establish how the Shoreline Ordinances at issue in this case arbitrarily deprive them of life, liberty or property. Moreover, the Simpsons fail to show that the ordinances do not serve a reasonably conceivable, legitimate legislative objective that does not violate their protected substantive due process rights. Because the Simpsons fail to meet these requirements, the district court's grant of summary judgment in favor of the City on the issue of substantive due process was not in error.

Procedural due process requires there be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions. *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999). This requirement is met when the party is provided with notice and an opportunity to be heard. *Id*. Due process is not a concept to be applied rigidly in every matter; rather, it is a flexible concept calling for such procedural protections as are warranted by the particular situation. *Id*. Because procedural due process is a constitutional issue, this Court exercises free review. *Brewer*, 138 Idaho at 862, 71 P.3d at 461.

In this case, the Simpsons argue their due process rights were violated, but they do not establish how they were denied notice and an opportunity to be heard. The record clearly reflects that the City initiated a lawsuit against the Simpsons to obtain an injunction and that the injunction proceeding provided the Simpsons with notice and an opportunity to be heard. Therefore, the district court's grant of summary judgment in favor of the City on the issue of procedural due process was not error.

C. The District Court Did Not Err In Dismissing The Simpsons' Counterclaim For Deprivation Of Equal Protection.

In order to establish a *prima facie* case of discriminatory application of the laws such that equal protection standards are violated, the Simpsons must first establish the existence of a "deliberate plan of discrimination based on some unjustifiable classification such as race, sex, religion, etc." *Henson v. Dep't of Law Enforcement*, 107 Idaho 19, 23, 684 P.2d 996, 1000 (1984). "Selective enforcement without more, does not comprise a constitutional violation under either the Idaho or United States Constitutions."

Id. Constitutional issues are questions of law subject to free review by this Court. *Brewer*, 138 Idaho at 862, 71 P.3d at 461.

The Simpsons' brief indicates that others have built structures on the beachfront property that is subject to the Shoreline Ordinances; however, the Simpsons have not shown that the City had a deliberate policy of enforcing the city ordinances against only a specific group of individuals based on some arbitrary classification such as sex, race or religious beliefs. Because the Simpsons have failed to show that the City's enforcement was based on an impermissible ground such as race, sex or religion, they have failed to establish a *prima facie* case for an equal protection violation. Therefore, this Court finds the district court did not err, and the grant of summary judgment in favor of the City on the Simpsons' equal protection claim is affirmed.

D. The District Court Did Not Abuse Its Discretion When It Denied The Simpsons' I.R.C.P. 40(d)(2) Motion To Disqualify.

A party may move to disqualify a judge from presiding in an action on the grounds that the judge is interested in the action or was an attorney for any party in the action. I.R.C.P. 40(d)(2)(A)(1) & (3). This Court reviews the denial of a motion to disqualify for cause under an abuse of discretion standard. *Samuel*, 134 Idaho at 88, 996 P.2d at 307. A judge is not disqualified from hearing a case on the ground that he or she made adverse rulings in the case. *Liebelt v. Liebelt*, 125 Idaho 302, 306, 870 P.2d 9, 13 (Ct. App. 1994).

The Simpsons argue Judge Hosack abused his discretion when he denied their Motion to Disqualify himself from this case. They assert Judge Hosack has an interest in the outcome of this case because he is one of the one hundred thirty-eight residents of Coeur d'Alene whose fence does not conform to Coeur d'Alene Municipal Code § 17.06.815(B) and he represented the City before becoming a district court judge. They contend this amounts to an abuse of discretion.

The heart of the Simpsons' claim on appeal to this Court is that the Shoreline Ordinances constitute a taking of their property. The argument that Judge Hosack abused his discretion appears to be an attempt to remove a judge who has ruled adversely to their case. The argument that Judge Hosack may have a fence that does not conform to the

City Code and that he represented the City before becoming a judge does not impair his ability to fairly and impartially preside over this case at the district court level, as is indicated by the fact that he denied the City's Motion For Summary Judgment regarding the fences on the upland parcel twice. Therefore, the district court did not abuse its discretion by denying the Simpsons' Motion to Disqualify.

IV.

CONCLUSION

This Court affirms the district court's grant of summary judgment regarding the waterward parcel and remands for proceedings consistent with this opinion.

Chief Justice SCHROEDER and Justice BURDICK, **CONCUR.**

Justice EISMANN, **DISSENTING.**

Because the majority adopts a fiction in order to circumvent the protections of the Idaho and United States Constitutions and then fails to apply the proper legal standard, I respectfully dissent.

The Fifth Amendment to the Constitution of the United States, applicable to the states through the Fourteenth Amendment, provides that private property shall not be taken for public use without just compensation. Section 14, of Article I, of the Constitution of the State of Idaho likewise provides, "Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor." When deciding whether a governmental regulation constitutes a taking, the focus is upon an owner's entire parcel of property, not upon an identifiable segment of that property. The argument that only a portion of the owner's property should be considered is called "conceptual severance"—pretending that a portion of the property has been severed from the whole. It was expressly rejected by the United States Supreme Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 331 (2002), wherein the Court stated, "Petitioners' 'conceptual severance' argument is unavailing because it ignores *Penn Central's* admonition that in regulatory takings cases we must focus on 'the parcel as a whole.'"

What the majority does here, however, is the opposite of "conceptual severance." It takes the parcel at issue, which is owned by Beach Brothers, Inc., and agglomerates it

with another parcel, which is owned by Jack and Virginia Simpson. It then pretends that those two separately owned parcels are both owned by Beach Brothers, Inc. The two parcels are not only under separate ownership, they are separated by a public road. The majority cannot point to a single court in the nation that has ever done this. The only reason for adopting the fiction that Beach Brothers, Inc., owns both parcels is to circumvent the protections of our State and Federal Constitutions. If the parcel owned by Beach Brothers, Inc., were considered separately, there would clearly be a taking. Requiring that land be left substantially in its natural state constitutes a taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The proper role of this Court is to protect the constitutional rights of the citizens of Idaho, not to create fictions in order to circumvent those rights.

Even if both parcels could lawfully be considered one for a takings analysis, the majority does not apply the correct legal standard. The parcel owned by Beach Brothers, Inc., is on the shore of Lake Coeur d'Alene and is called "Sanders Beach." The City of Coeur d'Alene wants that beachfront property available for public use, but it wants to avoid paying just compensation for it. It has therefore instructed its peace officers not to enforce the trespassing laws with respect to the property and has brought this action to prevent the construction of a fence designed to keep trespassers out. The City's conduct amounts to a physical taking of the property.

As the United States Supreme Court stated in *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987), a case in which the state of California was prevented from forcing a property owner to allow the public to use the owner's beachfront: "We have repeatedly held that, as to property reserved by its owner for private use, 'the right to exclude [others is] "one of the most essential sticks in the bundle of rights that are commonly characterized as property."'" (Citations omitted; bracket in original.) Likewise, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 n.8 (1992), another beachfront case, the Supreme Court stated:

> Though our prior takings cases evince an abiding concern for the productive use of, and economic investment in, land, there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause. See, *e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982) (interest in excluding strangers from one's land).

Indeed, the right to own private property must include the right to use reasonable means, such as perimeter fencing, to exclude trespassers, or the property is no longer private. Private property ownership is more than simply paying property taxes. It includes the right to the exclusive use of the property. *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987).

When the government action requires that a property owner permit access by others to the owner's real property, a taking has occurred. It is a physical taking. *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982). In the *Nollan* case, the state of California sought to require the owner of beachfront property to grant the public an easement across his beachfront in exchange for the right to rebuild their house. In the *Loretto* case, New York sought to require landlords to permit cable television companies to install cable facilities on their apartment buildings. In both cases, the Supreme Court held that such governmental action constituted a taking. In neither case did the Supreme Court analyze the taking issue based upon whether the governmental conduct destroyed the value of the real property or denied all economically beneficial or productive use of it. Governmental conduct that effectively deprives a landowner of the right to exclude trespassers from the owner's real property constitutes a physical taking of the property. Preventing reasonable efforts to exclude trespassers is no different from requiring public access.

Where, as here, the government prevents a landowner from fencing trespassers out so that the public can have access to the property, a physical taking of the property has occurred. That taking is compounded here where the City has instructed its peace officers not to enforce the trespassing laws on the property at issue. Even though the denial of the right to exclude strangers from one's land is supposed to invite exceedingly close scrutiny under the Takings Clause, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 n.8 (1992), the majority has simply ignored that issue in this case.

Justice TROUT, **CONCURS IN THE DISSENT.**